IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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May 11, 1976

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The Petitioners, Bertram M. Drassenower, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of New York, dated December 2, 1975, which, as described below, is the final judgment of the highest court of New York State in this proceeding.

Opinions Below

The said opinion and order of the Court of Appeals, 38 N.Y.2d 771 (1975), appear in Appendix A hereto (A-1). This order was entered *sub nom. In the Matter of the Claim for Benefits &c. made by Bertram M. Drassenower (Lead Case), et al., Appellants,* v. *Louis L. Levine, as Industrial Commissioner, Respondent.*•

On June 23, 1975, an order was entered by the Appellate Division of the New York Supreme Court (Appendix C hereto) (A-3) upon its opinion in this case rendered on June 12, 1975. Said opinion (A-5) reported *sub nom. In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM DRASSENOWER (Lead Case), et al., Appellants* v. *LOUIS L. LEVINE, as Industrial Commissioner, Respondent* appears herein as Appendix D and has been reported at 48 App. Div.2d 957, 369 N.Y.S.2d 227 (3rd Dept. 1975). An opinion rendered by the Unemployment Insurance Appeal Board of the New York State Department of Labor on July 30, 1974, and unreported, appears as Appendix E hereto (A-8). The prior opinion rendered by a Referee in the Unemployment Insurance Referee Section, New York State Department of Labor on February 25, 1974, and unreported, appears as Appendix F (A-10).

Jurisdiction

The order and decision of the Court of Appeals, to which this petition for Certiorari is directed, was dated and entered in this case on December 2, 1975 (A-1). Despite its brevity said final decision was clearly the judgment on

• A subsequent order of the Court of Appeals, denying Petitioners leave to appeal and relevant only for purposes of delimiting the time within which this Petition must be filed, is described on page 3 of this Petition under the caption "Jurisdiction." This unreported order appears in Appendix B hereto (A-2).

the merits of the highest court of the state. "Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of the case . . . ." *Ohio ex rel. Eaton* v. *Price,* 360 U.S. 246, 247 (1959); *See also, Hicks* v. *Miranda,* 422 U.S. 332, 334 (1975).

Petitioners invoked the discretionary jurisdiction of the Court of Appeals of New York, by moving for leave to appeal, "[I]n order to make it certain that the case could go no farther. . . ." *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20 (1923). The limit of time for applying to this Court is computed from the date when the discretionary writ was refused in New York. *American Railway Express* v. *Levee, supra,* at 21; *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157, 160 (1954).

The motion to the New York Court of Appeals for leave to appeal was denied on February 12, 1976 (A-2). This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Can New York State suspend the unemployment benefits of workers who are involuntarily laid off when their employer ceases operations because of the strike of a union of which they are not members and in which strike they did not participate, without violating the Equal Protection Clause of the Fourteenth Amendment?

2. Can New York State suspend the unemployment benefits of workers who are involuntarily laid off when their employer ceases operations because of the strike of a union of which they are not members and in which strike they did not participate, without depriving such laid-off persons of

their right to the due process of law as guaranteed by the Fourteenth Amendment?

Constitutional and Statutory Provisions Involved

The Due Process and Equal Protection Clauses, U.S. Const. Amend. XIV, § 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Labor Law § 592.1:

> "The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed . . . ."

Statement of the Case

On November 5, 1973 Trans-World Airlines, Inc. was struck by its flight attendants, represented by the Airlines Stewards and Stewardesses Association. In consequence, TWA suspended all flight operations on a nationwide basis (A-11).

Petitioners are aircraft maintenance workers, who are members of the International Association of Machinists, Local 1056, AFL-CIO and concededly they did not aid, abet or participate in the flight attendants' strike (A-5). However, Petitioners and all other members of the Machinists Union who appeared for work after the commencement of the flight attendants' strike were locked out and turned away because TWA had no work available for them.

Promptly thereafter and concededly in accordance with the procedural and filing requirements of the New York Labor Law, Petitioners applied for unemployment benefits. A local office of the New York Industrial Commissioner, without hearing, determined that such benefits should be suspended for seven consecutive weeks after the date of the strike, pursuant to § 592.1 of the New York Labor Law on the ground that the involuntarily unemployed machinists had lost their employment because of a strike at their places of employment (A-11). No other involuntarily idled persons are subjected to a suspension of their right to receive unemployment insurance benefits under New York law.

A timely consolidated hearing was held before a New York Unemployment Insurance Referee, at which hearing Petitioners (therein appearing as claimants) challenged, *inter alia,* the constitutionality of § 592.1. In his opinion (Appendix F hereto), the Referee declined to rule on this constitutional challenge, thereby preserving the right to appeal on such grounds. With reference to the claim that § 592.1 violated the Due Process and Equal Protection Clauses, the Referee stated:

> "Challenges to the constitutionality of Section 592 as raised by claimant's represenatives, are, of course beyond the Referee's scope of authority." (A-15)

On March 15, 1974 Petitioners appealed the Referee's decision to the Unemployment Insurance Appeal Board of New York, which issued its decision on July 30, 1974. Said decision affirmed the Referee's opinion and again declined to rule on the constitutional question, thereby preserving Petitioners' right to appeal (A-9).

Petitioners perfected a timely appeal to the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, asserting, among other things, that § 592.1 and the decisions below violated the Equal Protection Clause and deprived them of rights guaranteed by the

Due Process Clause. By opinion dated June 12, 1975 that Court affirmed the decision of the administrative tribunal below (A-5). With regard to the constitutional issues, the court below described and denied the position of the present Petitioners (therein identified as claimants) as follows:

> "Seeking to overturn the board's decision on this appeal, claimants argue that subdivision (1) of section 592 of the Labor Law violates the due process and equal protection clauses of the Federal and State Constitutions, that it does not require the temporary suspension from benefits of non-participants as well as participants in an industrial controversy, and that, as interpreted by the board, it is void as contrary to public policy. We cannot agree.
>
> "With regard to the constitutionality of the statute in question, both subdivision (1) of section 592 of the Labor Law and a similar earlier statute, former section 504 of the Labor Law, have been the subject of repeated constitutional attacks over a period of many years." (A-6) (citations omitted)

Thereafter, Petitioners perfected a timely appeal of right to the New York Court of Appeals under New York Civil Practice Law & Rules, § 5601(b)(1), on the ground that the appeal directly involved the validity of § 592.1 of the New York Labor Law, *inter alia,* under the provisions of the Fourteenth Amendment of the United States Constitution.* The State Industrial Commissioner moved to dismiss the appeal. Said motion was granted by the Court of Appeals on the sole "[G]round that no substantial constitutional question is directly involved." (A-1) Despite the highest court in New York's failure to expound the rationale for overruling the federal constitutional attack upon § 592.1, that issue was properly raised, having been asserted clearly and repeatedly by the present Petitioners at every stage of the proceedings in the administrative tribunals and in the New York courts. *Cf., Street* v. *New York,* 394 U.S. 576 (1969).

* Section 5601(b)(1) of the CPLR reads, in pertinent part, as follows: "(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right: 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States."

Reasons for Granting the Writ

With one exception, New York State provides equal access to unemployment insurance benefits for all eligible involuntarily unemployed persons. The segregated class comprises workers who become jobless because of a labor dispute in which they are not participants. The discrimination created by statute (New York Labor Law § 592.1) takes the form of an arbitrary, seven week suspension of the right to receive benefits otherwise generally available by law.

In the decisions below, the Court of Appeals and the Appellate Division sustained the state statute against Petitioners' challenge predicated upon violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In support of their position "that no substantial constitutional question" (A-1, A-5) is created by the challenged statute, the New York courts cited only their own prior decisions and the 40-year old decision of this Court in *W. H. H. Chamberlin, Inc.* v. *Andrews,* 299 U. S. 515 (1936), sustaining, without opinions, by an equally-divided Court, the decision of the New York Court of Appeals. [This Court's decision in *Chamberlin* is inapposite. It dealt only with an employer-sponsored claim that the entire unemployment insurance program would legally deprive them of property under the Due Process Clause. The propriety of New York's format for classifying involuntarily unemployed workers, challenged in this case, was not at issue in *Chamberlin.*]

After the rendition of the New York decision, a three-judge court in the United States District Court for the Northern District of Ohio held by opinion dated March 4, 1976, in *Hodory* v. *Ohio Bureau of Employment Services, et al.,* that a substantially identical provision of the Ohio Unemployment Insurance Law violated the Equal Protection and Due Process Clauses. (This unreported opinion is printed in Appendix G.) The Ohio Bureau of Employment Services has appealed to this Court, of right, under 28 U.S.C. §1253, from the judgment entered pursuant to said opinion. (The relevant documents appear in Appendix H.) There is, therefore, a direct conflict between a decision of the highest court of the State of New York and a three-judge United States District Court regarding the application of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to an important provision of state unemployment statutes. [Labor dispute disqualification provisions similar to those contained in the New York and Ohio statutes, while not customary, are contained in the unemployment insurance laws of a number of states.]*

The precise question posed by the instant case and by *Hodory* (A-16) has not heretofore been submitted to this Court. Moreover, the views expressed by the New York courts in the decisions below are at variance with recent decisions of this Court and of other federal courts regarding the necessity for predicating statutory discriminations upon a basis bearing a reasonable relationship to the purposes of the underlying legislation. *See, e.g., Jiminez* v. *Weinberger,* 417 U. S. 628, 636-7 (1974).

There is a substantial federal and public interest in the proper interpretation and application of the unemployment compensation insurance program. The legislation in each of the states is predicated on a system of federal-state

* Comparison of State Unemployment Insurance Laws, Unemployment Insurance Service, Manpower Administration, U.S. Dept. of Labor, at 41-41 through 4-42 (1974).

cooperation financed since 1935 by credits against federal taxation, of up to 90% thereof, allowed to employers who pay state taxes into state unemployment funds. 26 U.S.C. §§ 3301, 3302. State funds are deposited in the unemployment trust fund in the Federal Treasury, and grants are made by the Federal Government to support administration of, and provide additional benefits under, the state unemployment compensation plans. *See, e.g.,* 42 U.S.C. § 501, *et seq.* and § 1101, *et seq.*

Speaking for a unanimous court, Chief Justice Burger recently stated that, in establishing the unemployment compensation program, "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." *California Department of Human Resources Development, et al.* v. *Java, et al.,* 402 U.S. 121, 130 (1971). The decision in *Java* indicates the public interest in securing prompt benefit payments to replace wages for those workers whose unemployment is involuntary and without fault on their part. The contrary position taken by New York is an anachronism, requiring long overdue scrutiny to evaluate its consonance with the provisions of the Fourteenth Amendment.

I

Section 592.1 of the New York Labor Law Violates the Equal Protection Clause of the Fourteenth Amendment.

Section 592.1 of the New York Labor Law requires that individuals who lose employment because of labor disputes affecting their employer be deprived of unemployment insurance benefits for a period of seven weeks, regardless of whether or not such persons were parties to the dispute. Thus, the New York law establishes a class distinction between workers who become involuntarily unemployed

because of lack of work and those who become unemployed because of a strike. Employees of the latter category are subject to the said seven-week suspension of the accumulation of insurance benefits, a burden which is not imposed upon employees in the former class.

We need not here consider the question of whether § 592.1, insofar as it suspends benefits to strikers, is subject to constitutional scrutiny on the premise that the right to strike is a protected freedom. *Cf., Sherbert* v. *Verner,* 374 U.S. 398 (1963). There may be public policy considerations which justify a state in establishing a separate classification, for unemployment insurance purposes, for those persons who are direct parties to or supporters of a labor dispute. However, to treat individuals, such as Petitioners, who become jobless through no fault of their own, because of a strike or lockout to which they are not parties and in which they are not involved, in such a manner that they are deprived of benefits otherwise generally available to all other faultless, involuntarily unemployed persons is to create an irrational class distinction, in violation of the Equal Protection Clause of the Fourteenth Amendment.

As a question of first or early impression, the New York Labor Law could have been read not to create such an invidious differentiation. For the language and logic of the statute do not require this effect. However, for more than 35 years, the New York courts have consistently held that the language of § 592.1 (and its substantially identical predecessors) was "clear and unambiguous," in making "[A] distinction between those who are deprived of employment because of lack of work and those deprived of employment because of a strike." *In re Sadowski,* 257 App. Div. 529, 531, 13 N.Y.S.2d 553, 555 (3rd Dept. 1939). "Under this statute it is immaterial whether claimant was an actual striker or whether she was unable to work 'because of a strike'." *Id.* This construction of the statute was unequivocally accepted

by the Appellate Division in the instant case, and both the Court of Appeals and the Appellate Division stated below that the state's classification scheme did not even raise a serious constitutional question (A-1, A-6 to A-7).

It is plain that this consistent construction of the state's Labor Law by the New York courts cannot at this late date be questioned, as a matter of statutory interpretation, by the federal courts.*

The principal benchmark for determining whether a legislative classification meets equal protection standards is the question of whether or not a suitable governmental interest is furthered by the differential treatment. *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95 (1972). In this Court's words:

> "While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis." *Southern Ry. Co.* v. *Greene,* 216 U.S. 400, 417 (1910).

The primary governmental purpose served by unemployment insurance legislation is, of course, to provide financial assistance for the involuntarily unemployed and thus prevent a disaster to the jobless and their dependents. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586-7 (1937); *California Department of Economic Resources Development, et al.,* v. *Java, et al., supra; In re Sadowski, supra;* New York Labor Law § 501. The New York decisions, however, have stated

* In any event, an irrational scheme of classification or a format which creates unjustifiable discrimination is no more immune from being held constitutionally invalid under the Equal Protection Clause if it results from judicial gloss or interpretation than if it is dictated by unambiguous statutory language. *See, Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

that § 592.1 has, as an additional specific purpose, the state's interest in maintaining a neutral stance in labor disputes. *See, e.g.,* the decision of the Appellate Division in the instant case (A-5) and *In re Ferrara's Claim,* 10 N.Y.2d 1, 8, 217 N.Y.S.2d 11, 15-16 (1961).

As suggested above, it is arguable that differential treatment in the allocation of unemployment insurance benefits between strikers and non-strikers, in order to maintain a neutral position for the state in labor disputes, constitutes a rational classification in furtherance of a suitable governmental interest, which therefore does not violate the Equal Protection Clause. If one accepts this premise, then the granting of benefits to workers who are direct parties to a strike would, in fact, be subsidization of strikers and a method for placing employers at an unfair disadvantage, which circumstance the Legislature might regard as a legitimate basis for discriminating against strikers in the allocation of insurance benefits. It is nevertheless not clear that the state in fact undermines its neutral position by suspending benefits *even* as to strikers. Thus, in *Grinnell Corporation* v. *Hackett,* 475 F.2d 449 (1st Cir. 1973), *cert. denied,* 414 U.S. 858 (1973), which involved an unsuccessful constitutional challenge by employers to a state's statutory grant of unemployment benefits to strikers, the court noted that it was far from clear that payment of benefits would upset the balance of power between union and employer. 475 F.2d at 457-459. Similarly, in *Lascaris* v. *Wyman,* 31 N.Y.2d 386, 340 N.Y.S.2d 397 (1972), *rearg. denied,* 32 N.Y.2d 705 (1973), *cert. denied,* 414 U.S. 832 (1973), the New York Court of Appeals held that strikers were eligible to obtain public assistance benefits, stating, *inter alia:*

> "It may fairly be said that in cases such as this the policy of governmental neutrality in labor controversies is, in reality, little more than an admirable fiction. . . . it may not . . . be seriously maintained that the State adopts a neutral policy if it renders strikers helpless by denying them public assistance or welfare benefits to which they would otherwise be entitled." *Id.,* 31 N.Y.2d at 394, 340 N.Y.S.2d at 402.

However, the instant case relates *only* to the withholding of otherwise available unemployment insurance benefits to persons who lose work because of a strike to which they were not parties.

The Appellate Division's contention (A-6, A-7) that the "balance of power" between labor and management is subverted if employers subsidize the wages lost by those idled by disputes to which they are not parties is nonsense as applied to workers, such as Petitioners, who became unemployed as a result of circumstances beyond their control and in which they had no volitional involvement.

Until December 2, 1975, the Ohio Unemployment Insurance Law contained a similar strike disqualification provision.* In *Hodory* v. *Ohio Bureau of Employment Services, et al.* (unreported but reprinted at A-16 to A-30), a three-judge panel of the United States District Court for the Northern District of Ohio held the state's statute to be in violation of the Equal Protection Clause of the Fourteenth Amendment, as applied to individuals who became unemployed through a labor dispute in which they neither participated nor benefitted.

The *Hodory* court suggested that payment of benefit funds to striking workers "could be deemed to put" those strikers in an advantageous negotiating position with their employers, but that no such conclusion could rationally be reached in the case of payments of benefits to those unfortunate workers who lose jobs because of strikes in which

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* The relevant provisions of § 4141.29(D)(1)(a), including the amendments effective prospectively only commencing December 2, 1975, are set forth at A-18, A-19.

they did not participate. The court pointed out in *Hodory* that workers who are laid off in consequence of a strike in which they do not participate are "merely victims" of the strike, "as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect [sic] his employer's financial ability to continue to employ him." (A-27)

Rather than preserve the proclaimed policy of state neutrality in labor disputes, section 592.1 of the New York Labor Law inevitably operates to violate that precept. Continuation of a labor dispute obviously causes laid-off non-strikers to lose *both* their regular wages and unemployment compensation benefits, as a result of a controversy from which they can gain nothing. Denial of benefits to individuals who in no way participate in, finance or are directly interested in a labor dispute therefore has the effect of influencing disqualified workers to take the employer's side in a dispute and hence to put pressure upon other workers to settle their strike, perhaps upon unacceptable terms.

The concept of equal protection of the laws implies that legal burdens should be imposed upon persons in some rational relationship to their actions and wrongdoings. The Equal Protection Clause dictates the striking down of discriminatory laws, where a classification scheme is not justified by a legitimate state interest, compelling or otherwise, or where a format of statutory discrimination bears no reasonable relationship to a legitimate legislative purpose. *See, Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175-176 (1972); *Jiminez* v. *Weinberger,* 417 U.S. 628, 632 (1974).

To deny otherwise generally available unemployment insurance benefits to laid-off workers, such as the present Petitioners, who are not parties to a labor dispute is to impose a burden upon them for a totally adventitious

reason, in a context in which they are factually without fault. The denial of benefits to non-strikers, such as Petitioners, cannot fairly or rationally be treated as a means of avoiding subsidization of strikers. Hence, the denial of unemployment insurance benefits to non-strikers bears no rational relationship to the state's legitimate interest in remaining neutral in labor disputes.

An analogous question was presented to the United States District Court for the District of Connecticut in *Burrell, et al.* v. *Norton, et al.,* 381 F. Supp. 339 (D. Conn. 1974). The issue in *Burrell* was whether or not a Connecticut statute, providing emergency assistance for welfare recipients, could, under the Equal Protection Clause, limit the class of eligible beneficiaries to those whose dire circumstances arose from specified natural catastrophes and could constitutionally exclude persons whose needs arose by virtue of other emergencies. The court held that emergency assistance could not be withheld from welfare recipients solely by virtue of the cause of their dire circumstances. It was held in *Burrell* that this type of arbitrary denial of benefits failed to "rationally [further] some legitimate, articulated state interest", *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1973), and therefore violated the Equal Protection Clause. (381 F. Supp. at 344-5)

By parallel logic, the arbitrary classification of involuntarily unemployed persons in two classes, one constituting those who have lost their jobs because of the lack of work and the second constituting those who have lost their jobs because of labor disputes to which they are not parties, completely fails, in derogation of the *McGinnis* rule, to "rationally [further] some legitimate, articulated state interest", and, therefore, is illegitimate discrimination, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment.

The absence of any rationale in the Court of Appeals' opinion in the present case and the brevity of the Appellate Division's decision make it difficult to understand the theory upon which New York State relies in attempting to save the constitutionality of the statute. The cases upon which the Appellate Division relied for its conclusion that § 592.1 of the New York Labor Law is self-evidently constitutional are all inapposite. The only constitutional question presented in *Matter of George* [*Catherwood*], 14 N.Y. 2d 234, 242, 250 N.Y.S.2d 421, 427 (1964) was the employer-asserted claim that the entire Unemployment Insurance Law was unconstitutional as allegedly impairing contractual obligations and interfering with Congress' control of interstate commerce. *W. H. H. Chamberlin, Inc.* v. *Andrews,* 271 N.Y. 1 (1936) dismissed another, employer's, broadside attack upon the constitutionality of the Unemployment Insurance Law, as a whole.* The Appellate Division's decision in *Matter of Kelly* [*Catherwood*], 33 App. Div. 2d 830, 305 N.Y.S.2d 741 (3rd Dept. 1969), *aff'd,* 29 N.Y.2d 877, 328 N.Y.S.2d 442 (1972), recites a union challenge to the constitutionality of a predecessor to § 592.1 of the Labor Law, containing a similar labor dispute suspension of benefits provision, as improperly penalizing the exercise of concerted activity protected under the Fourteenth Amendment and the Supremacy Clause. The only relevant statement contained in the Appellate Division's decision in *Kelly* is the naked assertion that "[T]o require employers to subsidize wages lost by employees who are on strike or who have been locked out would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depends." (33 App. Div. 2d at 831, 305 N.Y.S.2d at 743.) The invalidity of this type of reasoning, as applied to laid-

* In 229 U.S. 515 (1936) that decision was sustained, without opinion, by an equally-divided Court.

off workers, has been demonstrated in this petition. The Court of Appeals in *Kelly* merely stated that a constitutional attack had been made by unemployment insurance claimants, and, without commenting thereon, sustained the decision below.

In other words, the New York courts have, in past decisions, held that § 592.1 is constitutional, without explaining the rationale for their conclusion or bothering to rebut, evaluate, or even present the bases asserted by litigants for challenging § 592.1. In the instant situation, the New York courts have treated their past *sub silentio* affirmations of the constitutionalty of § 592.1 on other grounds as giving that questionable statute the false imprimatur of a doctrine so long recognized and universally accepted that it no longer requires justification.

II

Section 592.1 of the New York Labor Law Violates the Due Process Clause of the Fourteenth Amendment.

Petitioners became "eligible" for unemployment insurance benefits when they were denied employment by their employer despite their willingness to work. *See,* New York Labor Law, §§ 591.1, 591.2. Having filed valid claims and registered as unemployed, Petitioners had a vested "entitlement" to benefits, under § 590.1 thereof.

While the state has no obligation to provide services or benefits to individuals, once such a governmental program has been initiated, the interest of an individual therein is a property right, which may be withheld only in compliance with the requirements of substantive and procedural due process. See *Richardson* v. *Belcher,* 404 U.S. 78 (1971); *Bronson* v. *Consolidated Edison Co. of New York.* 350 F. Supp. 443, 447 (S.D.N.Y. 1972).

Section 592.1 of the New York Labor Law in effect creates an irrebuttable presumption that the payment of unemployment benefits to an individual who is unemployed by reason of a labor dispute affecting his employer will subsidize the strike.* Self-evidently, such a presumption is not a truism; it is not necessarily true and does not have universal validity. As demonstrated in Point I, *supra,* such a presumption is not valid as applied to persons, such as Petitioners, who are not parties to the labor dispute which triggered their own loss of work. Since the conclusive presumption embodied in § 592.1 is plainly neither necessarily nor universally true in fact, and since the state has available to it practical alternative methods to implement the purposes of the unemployment insurance program, section 592.1 violates the Due Process Clause of the Fourteenth Amendment, at least insofar as pertains to individuals in Petitioners' class. *See, e.g., Turner* v. *Department of Employment Security, et ano.,* ——U.S.——, 46 L.Ed. 2d 181 (1975); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

As applied to individuals in Petitioners' class, section 592.1 of the New York Labor Law is also violative of the Due Process Clause because it reduces the eligibility for unemployment benefits of persons who are involuntarily jobless, because of a labor dispute to which they are not parties, and thereby deprives such persons of property rights, for a reason bearing no rational relationship to the stated purpose of unemployment insurance. Section 501 of the New York Labor Law states that the principal purpose of that law is the provision of benefits to "persons unemployed through no fault of their own". That the unemployment insurance law was intended to benefit all involuntarily jobless persons is substantiated by § 593.1

* There is also inherent in § 592.1 the irrebuttable presumption that such idled non-striker has committed a "fault", for which he may be justifiably disqualified from normal benefits. See New York Labor Law § 593.

which enumerates as disqualifying circumstances only matters which are within the power of the employee to control; for example, a claimant will be disqualified if he voluntarily leaves his employment without good cause.

The three-judge court held in *Hodory, supra,* that the substantially identical provisions of the Ohio statute in denying equal access to unemployment insurance benefits to "individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute" violated such workers' right to due process of law, as guaranteed by the Fourteenth Amendment (A-29).

By similar logic, section 592.1 violates the Due Process Clause by limiting the access to unemployment benefits of persons who are involuntarily unemployed as the result of a labor dispute to which they are not parties. This result bears no rational relationship to the proclaimed state policy of maintaining neutrality as between participants in labor disputes; instead, it punishes third-party victims of such disputes, *i.e.,* laid-off workers.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

ASHER B. LANS,
Attorney for Petitioners
555 Madison Avenue
New York, New York 10022

STANFORD G. LOTWIN
ROBERT STEPHAN COHEN
DEBORAH E. LANS
LANS FEINBERG & COHEN
Of Counsel

May 11, 1976

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APPENDIX A

Opinion and Order of the New York Court of Appeals Dismissing Appeal of Right, 38 N.Y.2d 771 (1975)

COURT OF APPEALS OF NEW YORK

December 2, 1975

Motion No. 913

In the Matter of

the Claim for Benefits &c. made by BERTRAM M. DRASSENOWER (Lead Case), *et al.*,

Appellants,

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Motion to dismiss the appeal granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Decision, Court of Appeals, Dec. 2, 1975

APPENDIX B

Order of the Court of Appeals Denying Motion for Leave to Appeal

COURT OF APPEALS OF NEW YORK

February 12, 1976

Motion No. 51

In the Matter of

the Claim for Benefits under Art. 18 of the Labor Law, made by BERTRAM M. DRASSENOWER (Lead case), *et al.*,

Appellants,

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Motion for leave to appeal denied.

Decision, Court of Appeals, Feb. 2, 1976

APPENDIX C

Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 14th day of April, 1975.

Present—Hon. LOUIS M. GREENBLATT, Justice Presiding
Hon. MICHAEL E. SWEENEY
Hon. T. PAUL KANE
Hon. ROBERT G. MAIN
Hon. JOHN L. LARKIN, Associate Justices

Index No. 25059

In the Matter of the Claim for Benefits under Article 18 of the Labor Law, made by BERTRAM DRASSENOWER (Lead Case) *et al.*,

Claimants-Appellants,

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Order of Affirmance

Claimants having appealed from a decision of the Unemployment Insurance Appeal Board, dated and filed in the Department of Labor, July 30, 1974, and said appeal having been argued by Robert Stephan Cohen, Esq., attorney for claimants-appellants, and by Irving Jorrisch, Assistant Attorney General, for the Respondent, during the above stated Term of this Court, and, after due deliberation, the Court having rendered a decision on the 12th day of June, 1975, it is hereby

Appendix C
Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department

ORDERED that the said decision, so appealed from, be and the same hereby is affirmed, with costs.

Enter:

Dated and Entered: Jun 23, 1975

JOHN J. O'BRIEN
Clerk

A True Copy
s/ JOHN J. O'BRIEN
Clerk

APPENDIX D

Opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, dated June 12, 1975, *sub nom. In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by Bertram Drassenower (Lead Case), et al., Appellants. Louis L. Levine, as Industrial Commissioner, Respondent,* 48 App. Div. 2d 957, 369 N.Y.S.2d 227 (3rd Dept. 1975)

SUPREME COURT—APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

June 12, 1975. 25059

In the Matter of the Claim of BERTRAM DRASSENOWER, (Lead Case) *et al.*,

Appellants.

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed July 30, 1974, which affirmed a decision of a Referee sustaining initial determinations of the Industrial Commissioner that claimants' benefit rights were to be suspended for seven consecutive weeks.

Claimants are members of the International Association of Machinists, Local 1056, who were idled because of a strike against Trans World Airlines by its flight attendants represented by the Airline Stewards and Stewardesses Association of the Transport Workers Union of America. Although admittedly non-participants in the strike, claim-

Appendix D
Opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, dated June 12, 1975, sub. nom.

ants were nonetheless laid off when Trans World Airlines curtailed its operations as a result thereof, and since their loss of employment was thus triggered by an industrial controversy in the establishment in which they were employed, the board found subdivision (1) of section 592 of the Labor Law applicable to their situation and affirmed the seven weeks suspension of their benefit rights as expressly provided in that statute.

Seeking to overturn the board's decision on this appeal, claimants argue that subdivision (1) of section 592 of the Labor Law violates the due process and equal protection clauses of the Federal and State Constitutions, that it does not require the temporary suspension from benefits of nonparticipants as well as participants in an industrial controversy, and that, as interpreted by the board, it is void as contrary to public policy. We cannot agree.

With regard to the constitutionality of the statute in question, both subdivision (1) of section 592 of the Labor Law and a similar earlier statute, former section 504 of the Labor Law, have been the subject of repeated constitutional attacks over a period of many years. That these attacks have proved unavailing (*Matter of George* [*Catherwood*], 14 N.Y. 2d 234; *Chamberlin, Inc.* v. *Andrews,* 271 N.Y. 1, affd. 299 U.S. 515; *Matter of Kelly* [*Catherwood*], 33 A.D. 2d 830, affd. 29 N.Y. 2d 877), is testimony to the soundness of the statutory provision challenged herein and strongly supportive of its continued existence. Moreover, we have seen no evidence of recent developments which would suggest the need for a change in the State's long established policy of standing aside for a time from labor disputes "to avoid the imputation that a strike may be financed through unemployment insurance benefits" (*Matter of Burger* [*Corsi*], 277 App. Div. 234, 236, affd. 303 N.Y. 654), and it is our opinion that to require employers to subsidize wages lost by those on strike or locked out "would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depends" (*Matter of Kelly, supra,* p. 831).

Appendix D
Opinion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, dated June 12, 1975, sub. nom.

Claimants' remaining contentions are likewise without merit. It is well settled law that both strikers and nonparticipating employees within a struck establishment are subject to a suspension from unemployment insurance benefits (*Matter of George, supra; Matter of Ferrara* [*Catherwood*], 10 N.Y. 2d 1). As to the public policy of this State, it is determined by the Legislature and was determined in 1935 by the enactment of the statute in question here, which remains the public policy of this State until such time as the Legislature sees the need for a change (*Farrington* v. *Pinckney,* 1 N.Y. 2d 74).

Decision affirmed, with costs.

GREENBLOTT, J. P., SWEENEY, KANE, MAIN and LARKIN, J. J., concur.

APPENDIX E

Opinion and Decision of Unemployment Insurance Appeal Board, New York State Department of Labor, dated July 30, 1974

DECISION

New York State Department of Labor
Unemployment Insurance Appeal Board

Re: *Names*	*S.S.A. Nos.*	*Referee Case Nos.*	*Appeal Board Case Nos.*
Bertram M. Drassenower	126-30-3315	73-51283	193,453
Harry C. Rudolph	078-16-8051	73-51152	193,631
William Slominsky	078-18-3676	73-51282	193,632
Walter Ehrenpreis	110-24-3928	73-51284	193,633
John A. Podrasky	082-07-3568	73-51787	193,634
Lawrence Aldous	053-12-4508	73-51788	193,635
Mario L. Echemendia	262-70-9062	73-51789	193,636
Alred Dove	099-24-3181	73-51790	193,637
Angelo Endrizzi	053-34-3998	73-51791	193,638
Enos E. Francis	092-40-0540	73-51792	193,639
Vincent Harrigan	095-12-2761	73-51793	193,640
Curtis Legrand	233-16-2225	73-51794	193,641
Stephen Ondocin	055-01-4837	73-51795	193,642
Lucy Mead	118-24-2504	73-51796	193,643
Louis V. Laura	122-32-2470	73-51797	193,644
John T. Keys	160-24-0953	73-51798	193,645
Felix A. Seda	084-32-1649	73-51897	193,646
John P. Cestola	071-12-0621	73-52059	193,647
Joseph A. Poggioreale	130-26-3810	73-52060	193,648
Anthony J. Marsella	059-30-3065	73-52061	193,649
Eugene M. McKenna	100-20-1939	73-52062	193,650
Harry C. Rudolph	078-16-8051	73-52063	193,651

Decision mailed and duly filed in the Department of Labor on July 30, 1974.

The claimants appeal from the decision of the referee filed February 25, 1974 sustaining the revised initial determinations of the respective local offices suspending the accumulation of benefit rights by the claimants during a period of seven consecutive weeks effective November 6

Appendix E
Opinion and Decision of Unemployment Insurance Appeal Board, New York State Department of Labor, dated July 30, 1974

through December 18, 1973 on the ground that each claimant lost his employment because of an industrial controversy in the establishment in which he was employed.

Combined hearings were held before the referee at which all parties were accorded a full opportunity to be heard and at which claimants, their attorneys and their union representatives, a representative of and a witness for the employer, and representatives of the Industrial Commissioner appeared and testimony was taken.

Prior to the hearings it was stipulated by and between all parties that the cases herein were test cases and that the decision of the referee herein will bind all other employees who are members of the International Association of Machinists whose work pattern is identical to these test cases; preserving, however, the individual right of appeal of any claimant and of the employer.

After a review of the record including testimony and evidence adduced before the referee and due deliberation having been had thereon, and having found that the referee's findings of fact and opinion are fully supported by the record, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the opinion of the referee as the findings of fact and the opinion of the Board; except that we find that the referee inadvertently stated that Patrick Sayers was a claimant in these proceedings, whereas Mr. Sayers appeared as a witness for the employer.

DECISION: The decision of the referee is affirmed.

HARRY ZANKEL,
Member

ISIDORE SCHECHTER,
Member

APPENDIX F

Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

New York State Department Of Labor
Unemployment Insurance Referee Section

Names	*Nos.*	Decision *Case Nos.*
Bertram M. Drassenower (Lead Case)	126-30-3315	73 51283
Harry Rudolph	078-16-8051	73 51152
William Slominsky	078-18-3676	73 51282
Walter Ehrenpreis	110-24-3928	73 51284
John A. Podrasky	082-07-3568	73 51787
Lawrence Aldous	053-12-4508	73 51788
Mario L. Echemendia	262-70-9062	73 51789
Alfred Dove	099-24-3181	73 51790
Angelo Endrizzi	053-34-3998	73 51791
Enos E. Francis	092-40-0540	73 51792
Vincent Harrigan	095-12-2761	73 51793
Curtis Legrand	233-16-2225	73 51794
Stephen Ondocin	055-01-4837	73 51795
Lucy Mead	118-24-2504	73 51796
Louis J. Laura	122-32-2470	73 51797
John T. Keys	160-24-0953	73 51798
Felix A. Seda	084-32-1649	73 51897
John P. Cestola	071-12-0621	73 52059
Joseph A. Poggioreale	130-26-3810	73 52060
Anthony J. Marsella	059-30-3065	73 52061
Eugene M. McKenna	100-20-1939	73 52062
Harry C. Rudolph	078-16-8051	73 52063

Decision mailed and duly filed in the Department of Labor on Feb. 25, 1974.

FINDINGS OF FACT: Combined hearings were held at which claimants, their representatives, representatives and witnesses for the employer and representatives of the

Appendix F
Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

Industrial Commissioner appeared. Testimony was taken.

By revised initial determinations effective November 6 through December 18, 1973, claimants' benefit rights were suspended, on the ground that they each lost their employment as the result of a strike, lockout or other industrial controversy at the establishments at which they were employed. By additional initial determination effective November 5 through November 18, claimant H. Rudolph, was ruled ineligible for benefits because of failure to comply with registration requirements.

By stipulation of the parties, the cases herein were designated as test cases for all other claimants having identical work patterns, preserving, however, the individual rights of appeal of any such claimant as well as of the employer.

Claimants, members of the International Association of Machinists, all worked for the employer herein in different job classifications at either Kennedy or La Guardia airports for varying periods of time prior to a strike by the employer's union cabin attendants which occurred on November 5. As a result of the strike, the employer's operations were curtailed and claimants laid-off. The strike ended December 18.

At Kennedy Airport, the striking cabin attendants regularly reported to and were directed and controlled from a single, large three-story structure maintained there by the employer and known as hanger "12". It was on the third floor of that structure that they signed in and out, received pre-flight instructions, took care of their personal pre-flight needs, awaited their actual departure times and spent any "layover" time when such occasions arose. In addition to

flight operations offices and employee lounges, the employer also maintained various administrative, payroll and other offices on the third floor of the structure, including some space specifically set aside for use by a grievance committee representing members of the union involved herein. The employer maintained a company cafeteria along with employee locker facilities on the second floor while the lower level consisted largely of a series of mechanical, electrical and various other shops. The three levels as aforedescribed comprised the central portion of the full structure. Extending to either side of this central portion, but all still under the same roof, and, with but one exception to be noted later, all forming part of the structure as originally constructed, were two large, high hangers or garage areas used for housing aircraft. An additional still higher area was added a few years back to accommodate the much larger air planes which are currently in use.

Returning to the third floor, that area also included a teletype office manned by members of the International Association of Machinists as well as training facilities for other employees [sic] members of the same union. The employer also maintained medical facilities for all other company employees on that floor. Outside of, and directly adjacent to the hanger space, extending for several hundred feet and separated from the surrounding airfield and from other nearby structures by thick, concrete "blast fences", were the so-called "Line" areas. These were, in effect, open extensions of the hanger areas where additional aircraft could be brought for servicing and maintenance. The surrounding "blast fences" had open areas to aircraft to be taken from the airport proper to the "line" and to allow for necessary machinery and equipment to be brought from a

nearby company garage. Those claimants herein who worked primarily on the "line" areas reported for their assignments at hanger 12 each day along with all other claimants whose work was primarily performed at the shops or the hanger space within the structure itself.

Company personnel who reported for work at hanger "12", including the striking flight personnel as well as the non-striking claimants herein, all were required to use the very same entrance to the structure, passing the same security guards at a company parking lot located in front of the building, as well as a further security post on the ground floor directly inside the structure itself. The parking lot was completely fenced off from the public thoroughfares and from other areas and represented the only reasonably direct approach to the structure.

At La Guardia Airport, the striking cabin attendants reported for their assignments at the general passenger terminal building used jointly by all the various airlines operating at that airport. They did so at particular set areas of the terminal assigned to this specific use of the employer herein. Since the employer's administrative, personnel and payroll facilities were centrally located at hanger 12 at Kennedy Airport, flight personnel assigned to La Guardia were required to report in via a tele-audograph system connecting the two locations. The employer, however, maintained briefing and lounge areas as well as grooming facilities for its flight personnel at La Guardia.

Claimant, Patrick Sayers, a ramp chief, was the only claimant herein who was assigned to La Guardia at the time of the strike. He and other personnel assigned there reported for work in the same manner and in the same general area as did the cabin attendants. In addition, they

Appendix F
Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

kept their personal belongings and received their pay at the passenger terminal there.

Claimant, H. Rudolph, did not file his original claim for benefits until November 19 for reasons best known and understood to himself. He was not advised by any employee of the Division of Employment not to file for benefits sooner.

OPINION: Section 592 of the Unemployment Insurance Law provides, in substance, for the suspension of a claimant's benefit rights where he or she loses employment because of a strike, lockout or other industrial controversy in the *establishment* in which he or she was *employed.*

In this case, the Industrial Commissioner determined that the striking cabin attendants [sic] "establishment", for purposes of Section 592, was hanger 12 at Kennedy Airport and the passenger terminal at La Guardia Airport. This was predicated on a finding that these sites constituted their "base of operations" at each of the respective airports. In this regard, the Industrial Commissioner's contention was squarely in line with previous Appeal Board and court rulings in similar circumstances. *Matter of Ferrara,* 10 N.Y.2d 1, aff'g 11 App. Div. 2d 177 as cited in A.B. 102,938 et-al; 173,518 A et-al; modifying AB 168,160 et-al. See also AB 155,452, distinguishing *Matter of Sierant,* 24 N.Y.2d 675, revg. 27 App. Div. 2d 403. In AB 155,452, the claimants involved worked in a single structure, albeit a rather large one encompassing a wide variety of divergent activities and operations. The Board there held that all the employees, strikers as well as non-strikers, were employed in a single establishment. Nothing in the record before me warrants a more narrow definition of the term "establishment" as urged by claimants' representatives or any departure from the position taken by the Industrial Commissioner.

Appendix F
Findings of Fact, Opinion and Decision of Unemployment Insurance Referee, New York State Department of Labor, dated February 25, 1974

There remains then only the question of determining whether claimants herein, or any of them, were employed at the struck "establishments" so as to warrant suspension of their benefit rights as provided by Section 592. The Industrial Commissioner's affirmative rulings in this regard were likewise predicated on the finding that each claimant had, as his or her "base of operations", either hanger 12 at Kennedy Airport or the passenger terminal at La Guardia Airport. Again, the evidence established that each claimant reported to work there and received, if not direct, at least general supervision, direction and control from the two structures involved. In line with the Court and Appeal Board rulings referred to above, it is concluded again that the position of the Industrial Commissioner in this regard must be sustained.

That claimants all lost their employment as the result of the strike by the cabin attendants was undisputed. Under the circumstances, it is therefore concluded the suspensions imposed were warranted in all cases.

It becomes unnecessary for the Referee to rule on the additional initial determination of failure to comply with registration requirements as respects claimant H. Rudolph. Challenges to the constitutionality of Section 592 as raised by claimant's representatives, are, of course beyond the Referee's scope of authority.

DECISION: The revised initial determinations suspending claimants' benefit rights because of loss of employment due to industrial controversy, are sustained.

/s/ DAVID WEISENBERG
Referee

APPENDIX G

Unreported Opinion and Order of Three-Judge Court in the United States District Court for the Northern District of Ohio, dated March 4, 1976, in *Hodory* v. *Ohio Bureau of Employment Services, et al.* (No. C75-15X)

UNITED STATES DISTRICT COURT
Northern District of Ohio
Eastern Division

No. C75-15X

LEONARD PAUL HODORY,

Plaintiff

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.*,

Defendants

CELEBREZZE, Circuit Judge, LAMBROS, District Judge
KRUPANSKY, District Judge.

Memorandum Opinion and Order

Plaintiff, Leonard Paul Hodory (Hodory) filed the above-captioned action, pursuant to 42 U.S.C. §1983, on behalf of himself and all other persons similarly situated whose claims for unemployment benefits were denied or will be denied because of the operative effective of a labor dispute disqualification provision in §4141.29(D)(1)(a) of the Ohio Revised Code.

Hodory challenged the constitutionality of §4141.29(D)(1)(a) on the grounds that: the provision is in conflict with §303(a)(1) of the Federal Social Security Act, 42 U.S.C. §503(a)(1) and violates the Supremacy Clause to the United States Constitution; the labor dispute disqualification contained therein denies plaintiff and the class he seeks to represent the right to equal protection of the laws, guaranteed under the 14th Amendment to the United States Constitution; and the overboard disqualification provision bears no real and substantial relation to the legislative purpose and constitutes a denial of due process of law guaranteed by the 14th Amendment to the United States Constitution.

Hodory requested the issuance of permanent injunctive relief to restrain the Ohio Bureau of Employment Services (Employment Bureau) and the Administrator, Albert E. Giles, from enforcing §4141.29(D)(1)(a) and a declaration that the statute is unconstitutional. In addition, plaintiff sought past unemployment benefits for himself and the class he purports to represent which he alleged were denied by virtue of the application of that statutory provision.

This matter came on for hearing before this three-judge Court on October 23, 1975. The following are the Court's findings of fact and conclusions of law.

I. FINDINGS OF FACT

The operative facts as set forth herein were not disputed by the parties.

Hodory was laid off from his job as a Millwright apprentice with the United States Steel Corporation (U.S. Steel), Ohio Works, in Youngstown, Ohio on November 12, 1974. He applied for unemployment benefits on November 13, 1974 and was subsequently notified by the Ohio Bureau of

Employment Services (Employment Bureau) that his claim was disallowed, pursuant to §4141.29(D)(1)(a) O.R.C.

Section 4141.29(D)(1)(a) provides, in pertinent part:

> (D) Notwithstanding division (A) of this section, no individual may serve a waiting period or be paid benefits under the following conditions:
>
> (1) for any week with respect to which the administrator finds that:
>
> (a) *His unemployment was due to a labor dispute* other than a lockout *at any factory, establishment, or other premises* located in this or any other state and *owned or operated by the employer by which he is or was last employed; and for so long as his unemployment is due to such labor dispute* . . . (Emphasis added.)

It is clear that Hodory became unemployed through no fault of his own. He was one of approximately 1250 United Steelworkers who was laid off by either U.S. Steel or Republic Steel Corporation at their plants in Ohio because of a nationwide strike by the United Mine Workers at coal mines owned and operated by these two steel companies. The steelworkers were in no way involved in the disqualifying labor dispute between the coal miners and the steel companies nor did they benefit from that dispute.

Hodory was denied unemployment benefits from November of 1974 through January 11, 1975, at which time the coal miners' strike was apparently terminated. The Employment Bureau's sole basis for denying Hodory's application for weekly benefits during this period was that such benefits were barred under the labor dispute disqualification found in § 4141.29(D)(1)(a) O.R.C.

Hodory has taken an administrative appeal from the decision of the Employment Bureau, which appeal is still pending. It is being considered along with the appeals of the approximately 1250 other claimants similarly situated as a "group appeal" by the administrative Board of Review.

Hodory resumed his employment on March 30, 1975 and is presently employed.

During the pendency of this lawsuit § 4141.29(D)(1)(a) O.R.C. was amended to provide, in pertinent part, that:

> . . . No individual shall be disqualified under this provision if: (i) HIS EMPLOYMENT WAS WITH SUCH EMPLOYER AT ANY FACTORY, ESTABLISHMENT, OR PREMISES LOCATED IN THIS STATE, OWNED OR OPERATED BY SUCH EMPLOYER, OTHER THAN THE FACTORY, ESTABLISHMENT, OR PREMISES AT WHICH THE LABOR DISPUTE EXISTS, IF IT IS SHOWN THAT HE IS NOT FINANCING, PARTICIPATING IN, OR DIRECTLY INTERESTED IN SUCH LABOR DISPUTE . . .

This amendment, Am. Sub. Senate Bill 173, however did not become effective until December 2, 1975, and is not to be retroactively applied.

II. Conclusions of Law

A. *Availability of Relief in this Court*

The first issue for this Court to consider is whether, in light of the pendency of the appellate administrative pro-

Appendix G
Unreported Opinion and Order of Three-Judge Court in the United States District Court for the Northern District of Ohio, Dated March 4, 1976 in Hodory v. *Ohio Bureau of Employment Services, et al. (No. C75-15X)*

ceedings, this Court is precluded from adjudicating plaintiff's claims and from issuing injunctive relief against the defendants should the Court conclude that plaintiff is entitled to such relief on the merits of his claims.

Initially, it should be noted that there is no absolute bar in this case against the issuance of injunctive relief under the provisions of 28 U.S.C. § 2283, the Anti-injunction statute. *Mitchum* v. *Foster,* 407 U.S. 225 (1972); *Gibson* v. *Berryhill,* 411 U.S. 564 (1973). The Court must, nevertheless, consider the possible applicability of certain established principles of equity, comity, and federalism which would require this Court to refrain from determining the claims for injunctive relief.

The Supreme Court has recently articulated those circumstances in which such principles may suggest that a federal court refrain from exercising jurisdiction or abstain from determining claims for injunctive relief: 1) where a party has failed to exhaust available administrative remedies; 2) where a party seeks to enjoin a pending state criminal prosecution in the absence of special circumstances as set forth in *Younger* v. *Harris,* 401 U.S. 37 (1971); or where abstention and a stay in federal court is indicated to afford the state courts an opportunity to determine unsettled questions of state law prior to federal court intervention on the federal constitutional questions. *Gibson* v. *Beryhill, supra,* 411 U.S. at 573-574.

Upon due consideration, the Court concludes that the circumstances of the present case do not present a situation where dismissal or abstention would be appropriate. While clearly the plaintiff herein has not exhausted the administrative remedies which are available under Ohio law, in *Gibson,* the Supreme Court stated specifically that administrative remedies need not be exhausted where the federal court plaintiff states a good cause of action under 42 U.S.C. § 1983. Moreover, in the instant action, exhaustion of the available administrative remedies would in all probability prove a futile effort to vindicate plaintiff's constitutional claims in ths case. Secton 4141.29(D)(1)(a), on its face, would appear to except the plaintiff from unemployment benefits for the period he was laid off due to coal miners' strike. In addition, the Employment Bureau has denied benefits to plaintiff, as well as the 1250 United Steelworkers, who were similarly effected [sic] by the coal miners' strike, solely on the basis of the challenged labor dispute disqualification.

It was established at the hearing that the administrative appeal process does not permit the plaintiff to challenge the constitutionality of § 4141.29(D)(1)(a). The agency is bound by the prior Ohio court determinations as to the effect of that provision, and the Ohio courts have held the disqualification provision to be constitutional.[1] The plain-

1. In an unpublished decision, the Court of Appeals of Montgomery County, Ohio, upheld the constitutionality of the provision. *Barnes* v. *Board of Review,* Case No. 3948, (1972). Moreover, the defendants cited to several Ohio Supreme Court cases in their brief and during oral argument in support of their position that § 4141.29 (D)(1)(a) does not create an unconstitutional classification in viola-

tiff's failure to exhaust his administrative remedies therefore does not require a dismissal of his claims.

With regard to the Supreme Court's pronouncement in *Younger* v. *Harris, supra,* and the Court's subsequent decision in *Huffman* v. *Pursue,* 420 U.S. 592 (1975), the Court finds that the principles set forth in those cases do not necessitate that this Court exercise restraint in determining the issues raised herein or from issuing injunctive relief, should plaintiff be entitled to the same. While the *Huffman* decision broadens the judicially-created *Younger* doctrine to include a prohibition against federal court interference with certain ongoing *civil* proceedings in the state courts, the Supreme Court in *Huffman* made it clear that its holding was limited to the enjoining of ongoing state-initiated *judicial* proceedings and that such prohibition did not extend to an action brought under 42 U.S.C. § 1983 in which a party was challenging state administrative action in federal court. *Supra,* n. 21.

Finally, this Court concludes that abstention would not be proper in this case. Section 4141.29(D)(1)(a) is not an ambiguous statute involving unsettled questions of state law which could be rendered constitutionally inoffensive by

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tion of the Equal Protection clause of the 14th Amendment. *Cornell* v. *Bailey,* 163 Ohio St. 50 (1955); *Continental Can Company, Inc.* v. *Donahue,* 5 Ohio St. 2nd 224 (1966). In *Cornell* v. *Bailey,* the Supreme Court noted that it was the positive intent of the Ohio General Assembly to exclude those individuals who were involuntarily unemployed as well as those voluntarily unemployed as a result of a labor dispute from benefits. The Supreme Court concluded that such determination was a legislative function and that the only relief available to an involuntarily unemployed claimant was to seek a legislative amendment to the statute.

a limiting construction in the state courts. *Daniels* v. *Waters,* F.2d (6th Cir. 1975). It has been held that "[A]bstention should not be applied merely to await an attempt to vindicate a claim of the appellant in state court." *Gay* v. *Board of Registration Commissioners,* 466 F.2d 879, 885 (6th Cir. 1972). In the instant case, plaintiff has not yet even reached the first level of judicial review and under §4141.28 of the Ohio Revised Code, he is required to undertake three administrative appeals before he will be entitled to file his challenge in the state courts, where, moreover, the issue as to the constitutionality of the labor dispute disqualification has apparently been settled.

Accordingly, for the reasons set forth above, the Court concludes that the principles of comity, equity, and federalism do not require that this Court dismiss the instant suit or abstain from deciding the claims presented herein until such time as the state courts may have an opportunity to adjudicate the same or from issuing whatever relief may be appropriate upon its determination.

B. *Class Certification*

Plantiff, in his complaint, defined the class he purports to represent herein as all persons whose claims for unemployment benefits have been or will be denied because of the operative effect of § 4141.29(D)(1)(a). While the Court does find that class certification of the claims for injunctive and declaratory relief and past benefits is appropriate, the class as defined by plaintiff in his complaint is

over broad in light of the nature of plaintiff's claims and the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff's factual allegations and the undisputed evidence presented herein established that Hodory and approximately 1250 members of the United Steelworkers in Ohio, who became unemployed through no fault of their own, were denied unemployment benefits by defendants for a specific period of time because of the labor dispute disqualification clause in § 4141.29(D)(1)(a), despite the fact that they may have been qualified in all other respects to receive the benefits.[2] With regard to this particular group of individuals, the Court finds that the prerequisites to certification of this action as a class action under Rule 23(a) have been met, and that the class action is maintainable under the provisions of Rule 23(b)(2).[3] In light of the fact that the class is certified as a Rule 23(b)(2) class and the nature of the relief sought, the Court concludes

2. At the hearing, plaintiff stated that the claims of some 6,100 Autoworkers in Youngstown, Ohio have been denied by defendants on the sole basis of the challenged disqualification provision. However, no further factual support was offered in this regard from which this Court can conclude that plaintiff's representation of these individuals in this suit would be proper under Rule 23.

3. The fact that plaintiff seeks the award of past unemployment benefits does not effect [sic] the certification of this class as a rule 23(b)(2) class. The monetary relief is essentially in the nature of equitable relief rather than damages, and there is authority to support the maintainability of the class under 23(b)(2) in such circumstances. *Bermudez* v. *U.S. Department of Agriculture,* 490 F.2d 718 (D.C. Cir. 1973); *see also, Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); 3B Moore's Federal Practice ¶ 23.40.

that notice prior to the determination of the claims herein is not required.

C. *Constitutional Validity of § 4141.29(D)(1)(a)*

Plaintiff has challenged the constitutionality of § 4141.29 (D)(1)(a) on several grounds. For the reasons set forth below, this Court concludes that the operative effect of that labor dispute disqualification provision violates the rights of plaintiff and the class he represents to equal protection and due process of law as guaranteed under the 14th Amendment to the United States Constitution and 42 U.S.C. § 1983.

Chapter 4141 of the Ohio Revised Code, which was enacted by the Ohio Legislature pursuant to the Federal Social Security Act, provides generally for the payment of benefits to unemployed individuals. In § 4141.29 it is indicated that the overall purpose of the legislation is to provide benefits as compensation for loss of remuneration due to *involuntary* total or partial unemployment. That provision contains a number of clauses which disqualify certain classes of unemployed individuals from receiving such benefits. In accordance with the apparent purpose of the enactment each of these classes, except one, disqualify only those individuals who become unemployed through some fault of their own.[4] Thus the provisions of § 4141.29(d)(1) reflect that an individual may not receive benefits if that person has been laid off for disciplinary reasons; or if the person quit work without just cause; or if the individual quit work

4. The statute was previously held constitutional in the case of *Lasko* v. *Garnes,* No. C 72-1350 (N.D. Ohio, decided August 14, 1973), wherein the disallowance of benefits because of pregnancy, was the basis of the challenge.

to become married or because of marital, parental, filial or other domestic obligations, or became unemployed because of pregnancy; or if the person has made false statements in an attempt to obtain benefits; or if the person was discharged for dishonesty in connection with his most recent employment; or if the person has become unemployed as the result of a labor dispute. Therefore, the only class of unemployed individuals who are presently ineligible for benefits as a result of their having become unemployed involuntarily are those persons who fall within the labor dispute disqualification found in § 4141.29(D)(1)(a).[5]

A state legislature may create a classification which discriminates against certain individuals without violating the Equal Protection clause in the 14th Amendment, if that classification furthers a suitable governmental interest. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

In the instant action, the defendants argued in their brief that the legitimate reasons for the enactment of § 4141.29 (D)(1)(a) were that:

> 1. Granting of benefits to workers laid off due to a strike in a parent company's subsidiary plant would in effect be subsidizing the union members;
>
> 2. Granting of benefits would place the employer at an unfair disadvantage in negotiations with the

5. Of course, as of December 2, 1975 defendants will not be permitted to deny benefits to one unemployed due to a labor dispute unless an element of fault—"financing, participating in, or directly interested in"—is demonstrated. However, the amendment does not moot the issues raised herein, since, as noted previously, it is not to be applied retroactively and will not effect [sic] the status of plaintiff and the class for the period during which they were denied benefits pursuant to § 4141.29(D)(1)(a).

> unions. If the financial burden of supporting its striking union members is shifted from the unions' treasury to the State of Ohio, it's conceivable that no concerted effort to negotiate a fair settlement would be pursued until the employer reached a financial crisis, thereby yielding to unreasonable and economically unsound union demands to prevent bankruptcy;
>
> 3. The State has a legitimate purpose in protecting the fiscal integrity of its compensation fund. Strikes involving large corporations such as U. S. Steel, Republic Steel . . . and other corporate giants involve many hundreds of employees, even thousands. Benefits paid to workers resulting from labor strikes lasting for many weeks or months would deplete the unemployment fund.

The Court concludes that defendants have failed to advance reasons which would establish that the State of Ohio had a legitimate purpose for discriminating against the instant class in the payment of unemployment benefits. Each reason advanced contemplates that a union member, who is unemployed by virtue of a labor dispute between his employer and another union, has some control over, is at fault, or stands to benefit from that labor dispute. In fact, the evidence presented herein established that plaintiff and the class he represents were merely victims of the coal miners' strike, as is the case with any individual who has become unemployed because of adverse circumstances or conditions which may effect [sic] his employer's financial ability to continue to employ him. The fact that the plain-

tiff and the 1250 class members also happen to be union members (of a different union) is certainly no legitimate reason, standing alone, to deny them benefits. Moreover, close scrutiny of the reasons for the State's classification reveals that what the state is actually intending to prevent is not the "subsidizing" of unemployed *union members, per se,* but the subsidizing of union-initiated work stoppages.

Certainly the three purposes offered by defendants would be legitimate reasons for the State's denial of benefits to unemployed members of a union which is involved in a labor dispute. However, the denial of benefits to plaintiff and the class herein in no way served the State's interest in seeking to avoid the subsidization of the coal miners' strike. Nor is it logical to conclude that payments of unemployment benefits to the *Steelworkers* would have placed U. S. Steel or Republic Steel at an unfair disadvantage in negotiations with the *coal miners' union.* Payments of funds to the steelworkers could hardly be deemed to put the coal miners in a position to refuse to negotiate with the steel companies until the companies reached a financial crisis, thereby causing the companies to yield to the unreasonable and economically unsound demands of the coal miners to prevent bankruptcy.

The Court finds, therefore, that the defendants have failed to demonstrate that the classification imposed by § 4141.29(D)(1)(a) is justified by a legitimate state interest under the circumstances of this case, and, accordingly, the Court concludes that the application of the labor dispute disqualification to deny benefits to plaintiff and the class certified herein is violative of the Equal Protection

clause of the 14th Amendment and plaintiffs' rights as guaranteed by 42 U.S.C. § 1983.

Similarly, the Court finds that the defendants have failed to demonstrate that the application of § 4141.29(D)(1)(a) with respect to plaintiff and the class bears a real and substantial relation to a legitimate state purpose and, therefore, the statutory provision as applied in this case to deny individuals who were unemployed through no fault of their own and neither participated in nor benefited from the labor dispute involving another union and their employer, also violates plaintiffs' right to due process of law guaranted by the 14th Amendment and 42 U.S.C. § 1983.

Since the Court has declared the application of § 4141.29 (D)(1)(a) to be constitutionally invalid as to plaintiff and the class members on equal protection and due process grounds, the Court need not reach the other issues raised by plaintiff in his complaint.

D. *Relief*

The Court finds that plaintiff and the members of the class of steelworkers, who were laid off for a specific period of time because of the labor dispute between their employer and the United Mine Workers and who, but for the labor dispute disqualification provision, § 4141.29(D)(1)(a), would have been entitled to collect unemployment benefits, are entitled to equitable relief in this case. Accordingly, the defendants, their agents and employees are enjoined from continuing to enforce § 4141.29(D)(1)(a) of the Ohio Revised Code so as to deny the unemployment

Appendix G
Unreported Opinion and Order of Three-Judge Court in the United States District Court for the Northern District of Ohio, Dated March 4, 1976 in Hodory v. *Ohio Bureau of Employment Services, et al. (No. C75-15X)*

benefits to plaintiff and the class members which they are entitled to receive. In this regard, the defendants shall pay those past unemployment benefits which would have been provided to each otherwise qualified claimant within this class to whom such benefits were denied on the sole basis of § 4141.29(D)(1)(a).

This case is hereby terminated.

IT IS SO ORDERED.

/s/ ANTHONY J. CELEBREZZE
Anthony J. Celebrezze
Circuit Judge

/s/ THOMAS D. LAMBROS
Thomas D. Lambros
District Judge

/s/ ROBERT B. KRUPANSKY
Robert B. Krupansky
District Judge

Dated: March 4, 1976

Appendix G
Judgment

UNITED STATES DISTRICT COURT
Northern District of Ohio
Eastern Division

No. C 75-15 Y

LEONARD PAUL HODORY,
Plaintiff,

v.

OHIO BUREAU OF EMPLOYMENT SERVICES, *et al.,*
Defendants.

CELEBREZZE, Circuit Judge, LAMBROS, District Judge, KRUPANSKY, District Judge.

Judgment

In accordance with the accompanying Memorandum Opinion and Order, the defendants are enjoined from continuing to enforce Ohio Revised Code § 4141.29(D)(1)(a) so as to deny the plaintiff and the class members the unemployment benefits to which they are otherwise entitled, and defendants are further ordered to pay past unemployment benefits which were denied plaintiff and members of the class solely on the basis of § 4141.29(D)(1)(a). Plaintiffs shall recover their costs of suit.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge

THOMAS D. LAMBROS
District Judge

ROBERT B. KRUPANSKY
District Judge

Dated: March 4, 1976

APPENDIX H

Notice of Appeal and Related Papers Filed by the Ohio Attorney General in *Hodory* v. *Ohio Bureau of Employment Services, et al.*

UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Civil Action No. C75-15-Y

LEONARD PAUL HODORY,
Plaintiff,

vs.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that the Ohio Bureau of Employment Services, Albert G. Giles, Administrator, defendants above named, hereby appeal to the Supreme Court of the United States from the final order and judgment of the United States District Court, Northern District of Ohio, Eastern Division entered in this action on March 4, 1976 and filed on March 5, 1976.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

WILLIAM J. BROWN
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Appendix H
Notice of Appeal and Related Papers Filed by the Ohio Attorney General in Hodory v. Ohio Bureau of Employment Services, et al.

UNITED STATES DISTRICT COURT
For The Northern District of Ohio
Eastern Division
Civil Action No. C75-15-Y

LEONARD PAUL HODORY,
Plaintiff

vs.

OHIO BUREAU OF EMPLOYMENT SERVICES
and
ALBERT G. GILES,
Defendants

Motion to Certify the Record and Transmit to the United States Supreme Court

The defendants, Ohio Bureau of Employment Services and Albert G. Giles, intend to file in the Supreme Court of the United States a Notice of Appeal for a review of the order and judgment entered in the above-entitled proceeding.

The defendants accordingly request that you prepare and certify, for transmission to the Clerk of the Supreme Court of the United States, a copy of the entire record that was before this court in the above captioned case, including the opinion, order and judgment of this court.

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Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,

Petitioners,

against

LOUIS J. LEVINE, as Industrial Commissioner,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Petitioners,

against

LOUIS J. LEVINE, as Industrial Commissioner,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent opposes the petition for a writ of certiorari to review an order of the New York Court of Appeals dated December 2, 1975, affirming a judgment of the Supreme Court of the State of New York, Appellate Division, Third Department dated April 14, 1975.

Opinions Below

The opinion and the order of the Court of Appeals, 38 N Y 2d 771 (1975), appear in petitioners' Appendix A. This order was entered *sub nom. In the Matter of the Claim for Benefits &c. made by Bertram M. Drassenower (Lead Case, et al., Appellants* v. *Louis L. Levine, as Industrial Commissioner, Respondent).*

On June 23, 1975, an order was entered by the Appellate Division of the New York Supreme Court (petitioners' Appendix C) upon its opinion in this case rendered on June 12, 1975. Said opinion reported *sub nom. In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by Bertram Drassenower (Lead Case), et al., Appellants* v. *Louis L. Levine, as Industrial Commissioner, Respondent* appears as petitioners' Appendix D and has been reported at 48 A D 2d 957, 369 N.Y.S. 2d 227 (3d Dept., 1975). An opinion rendered by the Unemployment Insurance Appeal Board of the New York State Department of Labor on July 30, 1974 and unreported, appears as petitioners' Appendix E. The prior opinion rendered by a Referee in the Unemployment Insurance Referee Section, New York State Department of Labor on February 25, 1974, and unreported, appears as petitioners' Appendix F.

Jurisdiction

The order and decision of the New York Court of Appeals was dated and entered on December 2, 1975. Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. Was the petition timely filed?

2. Have petitioners' claims been foreclosed by prior decisions of this Court?

Statement of the Case

Petitioners are members of the International Association of Machinists employed by Trans-World Airlines. On November 5, 1973, flight attendants represented by Airline Stewards and Stewardesses Association of the Transport Workers Union of America went on strike as a result of which petitioners were laid-off. The strike ended December 18, 1973. A local office of the New York Industrial Commissioner, a New York Unemployment Insurance Referee and the Unemployment Insurance Appeal Board of New York found that petitioners lost their employment because of an industrial controversy in the establishment in which they were employed and were thus subject to a suspension of unemployment insurance benefits for seven weeks as specifically provided in the New York Labor Law, § 592.1.

The decision of the Appeal Board was upheld by the Supreme Court of the State of New York, Appellate Division, Third Department. Petitioners' appeal to the New York Court of Appeals was dismissed for want of a substantial constitutional question. Petitioners' subsequent motion for leave to appeal to the Court of Appeals was denied.

Reasons for Denying the Petition for Certiorari

I.

The petition was not timely filed.

Pursuant to 28 U.S.C. § 2101(c), a petition for certiorari must be filed within ninety days after entry of the judgment of the State Court of last resort. Failure to file

within that period is jurisdictional and the petition must be denied for want of jurisdiction. *Department of Banking* v. *Pink,* 317 U.S. 264 (1942).

The ninety day period in the case at bar must be counted from December 2, 1975, the date the New York Court of Appeals dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved". (petitioners' Appendix A). Petitioners' gratuitous motion for leave to appeal to the Court of Appeals, which was denied February 12, 1976 (petitioners' Appendix B) does not toll the ninety day period.

Petitioners admit that the order and decision of the Court of Appeals to which this petition is directed is that dated December 2, 1975 (petitioners' Brief, pp. 2-3). Once their appeal as of right, pursuant to New York Civil Practice Law & Rules 5601(b), was dismissed for want of a substantial constitutional question, their motion for leave to appeal pursuant to CPLR 5602(a)(1) was superfluous since it was based essentially on the same grounds as the appeal that was dismissed.* Since the motion for leave to appeal presented no new arguments to the Court of Appeals, it could not and did not affect the final decision of the Court of Appeals, which petitioners seek to have this Court review, and the denial of the motion does not extend the time in which petitioners were required to file their petition for certiorari.

In *Department of Banking* v. *Pink, supra,* this Court held that a motion to amend the remittitur of the New York Court of Appeals which does not seek reargument or rehearing does not extend the time in which to apply for

* Indeed, in the affirmation of Robert Stephen Cohen in support of their motion for leave to appeal, par. 11, petitioners requested that if leave to appeal be granted they be permitted to submit as their main brief their brief previously submitted on the appeal of right since "[t]he facts and legal issues involved in both appeals are identical . . .".

certiorari. This Court explained that the test for determining whether a particular motion tolls the ninety day period is whether the Court had "in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court" (citation omitted). 317 U.S. at 268.

The decision of December 2, 1975 was final. The Court of Appeals found that petitioners had presented no substantial constitutional question. That decision "plainly and properly settled with finality" *Federal Trade Commission* v. *Honeywell Regulator Co.,* 344 U.S. 206, 212 (1952) petitioners' claims. The motion for leave to appeal, in light of the earlier determination, had and could have had no import on what petitioners would ask this Court to review.

The decision of December 2, 1975 was the "final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California,* 324 U.S. 598, 551 (1945). The ninety days began to run at that time. Since this petition was filed over two months after the ninety days, it was not timely and must be dismissed for want of jurisdiction.*

* *American Railway Express Co.* v. *Levee,* 263 U.S. 19, 20 (1923) and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954) do not hold to the contrary, since there, the time was counted from when the highest state court refused to review a judgment of an intermediate state appellate court. There, unlike here, there would have been no jurisdiction in this Court had the petitioners not applied first to the state's highest court. Here, the first decision was a final decision. Petitioners attempt to present the same claim again does not make the decision of December 2, 1975 less final. Nor can petitioners' motion for leave to appeal be considered a petition for rehearing, see *United States* v. *Healey,* 376 U.S. 75 (1964) since petition for rehearing would, by definition, not be foreclosed by the earlier decision, as was petitioners' motion foreclosed by the first Court of Appeals decision. The Court of Appeals may consider only questions of law. New York Constitution, Art. 6, § 3(a). Having determined that there was no constitutional question, there would be no other question of law for the Court of Appeals to review that would have motivated the Court of Appeals to exercise its discretionary jurisdiction pursuant to the New York Constitution, Art. 6, § 3(b).

II.

Petitioners' claims are foreclosed by prior decisions of this Court.

That petitioners' constitutional claims are without merit is demonstrated by this Court's recent decisions in *Weinberger* v. *Salfi,* 422 U.S. 749 (1975) and *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). In both cases, this Court upheld the right of the government, Federal or State, to exclude from insurance coverage certain groups notwithstanding the otherwise legitimate claims the members of those groups had on receipt of insurance funds.* As in *Weinberger* v. *Salfi, supra,* the New York Legislature has determined that "the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility". 422 U.S. at 772.

As indicated by the opinion of the Appellate Division, Third Department (petitioners' Appendix D), the New York Labor Law § 592.1 furthers the policy of New York State to stand

> "Aside for a time from labor disputes 'to avoid the imputation that a strike may be financed through unemployment insurance benefits' (*Matter of Burger* [*Corsi*], 277 App. Div. 234, 236 affd. 303 N.Y. 654) and . . . to require employers to subsidize wages lost by those on strike or locked out 'would subvert the delicate balance of power existing between labor and management upon which the collective bargaining process depends' (*Matter of Kelley* [*Catherwood*], 33 A D 2d 830, affd. 29 N Y 877)" Petitioners' appendix A-6-A-7.

* The Appellate Division opinion also states: "It is well-settled law that both strikers and non-participating employees are subject to a suspension of unemployment insurance benefits (citing cases). As to the public policy of this State, it is determined by the Legislature and was determined in 1935 by the enactment of the statute in question here, which remains the public policy of this State until such time as the Legislature sees the need for a change (citation omitted)."

As in *Geduldig* v. *Aiello, supra,* the State's under-inclusion of certain risks does not violate the United States Constitution. *Richardson* v. *Belcher,* 404 U.S. 78 (1971).

The decision in *Hodory* v. *Ohio Bureau of Employment Services,* 408 F. Supp. 1016 (N.D. Ohio 1976) (3 JJ Court) (petitioners' Appendix G) appeal filed, 44 U.S.L.W. 3686 provides an insufficient ground for granting the petition. First, the Ohio statute excluded for the entire duration of the labor dispute those employees who applied for unemployment insurance, while the New York statute excludes applicants for only seven weeks. Second, as indicated by *Weinberger* v. *Salfi, supra* and *Geduldig* v. *Aiello, supra, Hodory* was wrongly decided. The Court in *Hodory* merely substituted its judgment for that of the Ohio Legislature. It failed to consider the leeway that this Court has provided the government to determine eligibility requirements for and what groups should be included in public programs of insurance.* The distinction created by the New York Legislature are clearly constitutional.

* Insofar as there is a conflict between *Hodory* and the New York Court of Appeals, if indeed there is a conflict, it may be resolved by this Court on the direct appeal from the judgment of the District Court for the Northern District of Ohio. Certiorari was denied in a somewhat similar case: *ACUNA* v. *California Unemployment Insurance Appeals Board,* 75-802, cert. den. 44 U.S.L.W. 3531 (March 23, 1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York,
July 9, 1976.

Respectfully submitted,

LOUIS J. LEFKOWITZ
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Attorney for Respondent

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of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

REPLY BRIEF FOR PETITIONERS

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August 9, 1976

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Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,

Respondent.

REPLY BRIEF FOR PETITIONERS

This brief is submitted in reply to the Brief for Respondent in Opposition to the instant petition for a writ of certiorari. Respondent, faced with the holding in *Hodory* v. *Ohio Bureau of Employment Services, et al.* (N.D. Ohio 1976) (3 Judge Court), *app. filed,* 44 U.S.L.W. 3686, which unequivocally supports the instant petition, has chosen to emphasize an alleged technical defect in the petition. As demonstrated below, this technical argument is without merit and the petition should be granted as presenting substantial constitutional questions.

Reasons For Granting The Writ

I

The Petition Was Filed Timely

Respondent contends that the instant petition was untimely filed because the ninety-day time period prescribed by 28 U.S.C. § 2101(c) must be computed from December 2, 1975, the date on which the New York Court of Appeals dismissed Petitioners' appeal as of right to that Court from the decision of the Supreme Court, Appellate Division (A-1)*. As demonstrated below, that decision was not a final one and the proper time from which to compute the time limitation is February 12, 1976, the date on which the motion for leave to appeal was denied by the Court of Appeals (A-2).

New York Civil Practice Law and Rules § 5601(b) provides in pertinent part that an appeal as of right to the Court of Appeals lies only where a final order of the Appellate Division has determined an action and where a constitutional question is "directly involved".

In the words of the accepted authority on the procedures and jurisdiction of the New York Court of Appeals:

> "[T]he requirement that a constitutional question be 'directly involved' is not easy to apply. . . . The body of law on this subject is fragmentary and does not permit a definitive statement in all situations." Cohen and Karger, *The Powers of The New York Court of Appeals*, § 54, p. 250 (1952).

Perhaps it is the ambiguity inherent in the New York law with regard to the jurisdiction of the Court of Appeals which resulted in the protective provision of Civil Practice Law and Rules § 5514(a), which provides:

* All page references unless otherwise noted are to Petitioners' Appendices.

> "*Alternate method of appeal.* If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise."

The dismissal of Petitioners' appeal as of right to the Court of Appeals in the present case thus operated to extend their time to move for leave to appeal and deprived the order of the Appellate Division of finality. The filing of the motion for leave to appeal, pursuant to Civil Practice Law and Rules §§ 5514 and 5602, therefore tolled or extended the filing requirement of 28 U.S.C. § 2101(c) in the same manner as the filing of a motion for reconsideration or rehearing suspends the finality of a judgment or tolls the ninety-day requirement. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974); *United States* v. *Healey*, 376 U.S. 75 (1964).

Indeed, had Petitioners filed their petition for a writ with this Court after the December 2, 1975 order, dismissing the appeal as of right to the Court of Appeals, had been entered and without moving for leave to appeal, that petition for certiorari would have been untimely, as premature, and subject to dismissal. For example, in *Matthews* v. *Huwe*, 269 U.S. 262 (1925), the intermediate appellate court affirmed the decision below. Appeals as of right were then presented to the highest court in Ohio, which dismissed on the ground that no "debatable" constitutional question was presented. Writs of error to this Court were thereafter sought and allowed. Subsequently, however, this Court granted motions to dismiss those writs, holding:

> "[T]he plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the

> state. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court [of the state] in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made." *Id.*, at 265.

See also, *Andrews* v. *Virginian Railway Company*, 248 U.S. 272 (1919).

Gotthilf v. *Sills*, 375 U.S. 79 (1963), is also probative. There, after the Appellate Division affirmed the lower court's decision, Petitioner filed a motion in the New York Court of Appeals for leave to appeal, which was denied as jurisdictionally defective for want of a final order below. An appeal to the Court of Appeals as of right was dismissed upon the same ground. The petition for certiorari was dismissed as improvidently granted because Petitioner failed to apply to the Appellate Division for permission to appeal the non-final order to the highest court.*

Similarly, at bar, had Petitioners, after the dismissal of the appeal as of right on the jurisdictional ground, failed to move for leave to appeal, under *Gotthilf* their petition for certiorari would have been premature, since the December 2, 1975 decision was not "[T]he final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 551 (1945).

Respondent's contention that the motion for leave to appeal was "superfluous" is inaccurate. The appeal as of right was dismissed upon the ambiguous ground "that no substantial constitutional question is directly involved" (A-1). That critical language might plausibly have been construed to mean either (a) that any constitutional questions directly involved were frivolous or (b) that substantial constitutional questions were presented, but not

* The provision of the New York Civil Practice Act relevant in *Gotthilf* related only to leave to appeal non-final orders and is inapposite at bar.

"directly" involved. *See,* Cohen and Karger, *supra,* § 57. Indeed, Petitioners argued in the Appellate Division and in opposition to the motion to dismiss, *inter alia,* that New York Labor Law § 592.1 was susceptible to two constructions and that only *as interpreted* below was the statute unconstitutional (*see,* A-7). The December 2, 1975 decision (A-1) could, therefore, have been based upon the theory that, as a question of construction was involved, the constitutional issue was only indirectly involved.*

However, the later decision of the New York Court of Appeals denying Petitioners' motion for leave to appeal (A-2) has made it clear that the Appellate Division's reading of § 592.1 of the New York Labor Law, as applying equally to strikers and involuntarily laid off persons, is the settled and authoritative interpretation of the statute. Therefore, the statute raises questions of compliance with the Constitution rather than of statutory interpretation.** The motion for leave to appeal was therefore not gratuitous, but instead was critical to resolve the ambiguity in the Court of Appeal's prior decision.

Moreover, the ability of a party to secure a hearing in this Court should not become a dangling issue, where the right to a hearing can be lost because of the complexities and uncertainties of the procedure for seeking a hearing in the highest state court. This is particularly true since the proper distribution of judicial functions in a federal system requires that litigants in state courts exhaust all reasonable appeals and opportunities to secure a hearing in the highest court of the state before invoking review in this Court. *See, e.g., North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

* Petitioners so argued in the affirmation of Robert S. Cohen in support of the motion for leave to appeal.

** Respondent concedes that the section's construction is settled. (Resp. Br. p. 6).

The authority cited by Respondent is inapposite. In *Department of Banking* v. *Pink*, 317 U.S. 264 (1942), the relevant filing time requirement was held not to have been extended by a motion to amend the Court of Appeal's remittitur as to mere formalities. Significantly, that motion, unlike the motion for leave to appeal in the case at bar, did not seek "alteration of the rights adjudicated." *Id.*, at 266. In *Federal Trade Commision* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), the petition was held untimely because the subsequent action of the court below neither affected matters of substance nor resolved a genuine ambiguity. *Id.*, at 211-212. Both *American Railway Express Co.* v. *Levee*, 263 U.S. 19 (1923), and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), reiterate that where the state's highest court is possessed of discretionary appellate jurisdiction, such jurisdiction must be invoked in order to satisfy the principle of finality.

Since, under the holding of *Matthews, supra*, failure to apply for leave to appeal in the instant case would have barred the filing of the within petition as premature, and since under Civil Practice Law and Rules § 5514(a) Petitioners' time was extended following the dismissal of the appeal as of right, it is respectfully submitted that the within petition was timely filed.*

*No case has been found which rules upon the precise question presented here within the context of New York procedure. At a minimum Petitioners are placed in an inescapable dilemma if Respondent's arguments are accepted, since under *Matthews, supra*, failure to move for leave to appeal would have rendered a petition to this Court vulnerable, and the making of such a motion, according to Respondent, was superfluous and rendered the petition untimely. Should this Court clear a path through this labyrinth which overrules *Matthews*, then in fairness to litigants, any such newly stated direction should be given only prospective application. *Cf.*, *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

II

The Disqualification Of Involuntarily Idled Workers Is Constitutionally Impermissible

Respondent asserts, without discussion, that the § 592.1 suspension of benefits furthers the State's policy of neutrality with respect to labor disputes. However, the fallacy of this reasoning, even as applied to payments to strikers, has been recognized. *Lascaris* v. *Wyman*, 31 N.Y.2d 386, 350 N.Y.S.2d 397 (1972), *rearg. denied*, 32 N.Y.2d 705 (1973), *cert. denied*, 414 U.S. 832 (1973).* The suspension of benefits to non-strikers on this ground has been termed the triumph of "seductive cliches" over logic. Fierst, H. and Spector, M., "Unemployment Compensation In Labor Disputes," 49 *Yale L.J.* 461, 464 (1940). *See also, Hodory* v. *Ohio Bureau of Employment Services, et al.* (A-16 to A-30), *app. filed*, 44 U.S.L.W. 3686; "Note-Statute Suspends Un-Employment Benefits Regardless of Employee Fault," 39 *N.Y.U.L. Rev.* 873, 875-876 (1964). Suspension of benefits to workers who are laid off because of a strike in which neither they nor their union were participants, resulting in loss by such persons both of their regular wages and unemployment benefits can serve only to influence disqualified workers to take the employer's side in a dispute and hence to put pressure upon the strikers to resolve their controversy, perhaps upon unacceptable terms.

Weinberger v. *Salfi*, 422 U.S. 749 (1975) and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), cited by Respondent, are inapposite. In *Weinberger* the duration-of-relationship requirement was termed:

> "[A] widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its [the program's] terms." *Id.*, at 776

*"It may fairly be said that . . . the policy of governmental neutrality in labor controversies is, in reality, little more than an admirable fiction." *Id.*, 31 N.Y.2d at 394, 350 N.Y.S.2d at 402.

Further, the Court found that Congress "could rationally have concluded" that the durational requirement would protect against the specified abuse. *Id.*, at 777.

By contrast, the New York disqualification cannot rationally be conceived to promote State neutrality nor is it a "widely accepted response". In fact, forty-six states and the District of Columbia have by statute or judicial decision determined that persons who lose their employment because of a strike in which they are not participants should have the same eligibility for unemployment benefits as all other involuntarily unemployed workers. *See e.g.*, Fierst & Spector, supra, p. 462 n. 5 and Appendix; *Usher* v. *Department of Industrial Relations,* 261 Ala. 509, 75 So.2d 165 (1954); *Chrysler Corporation* v. *California Unemployment Stabilization Commission,* 116 Cal. App.2d 8, 253 P.2d 68 (1953); *Bodinson Mfg. Co.* v. *California Unemployment Commission,* 17 Cal.2d 321, 109 P.2d 935 (1941); *Lowe Brothers, Inc.,* v. *Unemployment Insurance Appeal Board,* 332 A.2d 150 (Del. Supr. 1975); D.C. Code Ann., tit. 46 § 310(f) (West 1968); *Hodory* v. *Ohio Bureau of Employment Services, et al.,* (N.D. Ohio 1976) (3 Judge Court) (Pet. App. G.), *app. filed,* 44 U.S.L.W. 3686; Penn Stats. Ann., tit. 43 § 802(d) (West 1964); Utah Code Ann., tit. 35 § 35-4-5(d) (Allen-Smith Co. 1953).

In *Geduldig, supra,* a California disability insurance system, financed by fixed employee contributions, was challenged on the sole ground that the system was underinclusive because it failed to cover disabilities resulting from normal pregnancies. In upholding the statute the Court emphasized that the one percent contribution rate bore a close and substantial relationship to the level of benefits payable and risks insured and that the State had demonstrated a strong commitment not to increase the contribution rate, *e.g.*, by expanding coverage. At bar, however, New York has not demonstrated a commitment to a steady rate.

Provision is made in the New York Labor Law § 577(2) for subsidiary contributions by employers upon a finding that the general account within the fund has dropped below specified amounts. The suspension of benefits provision itself was altered from a ten-week duration, § 504.2(b) L. 1941 c. 783 § 2 (repealed by L. 1944, c. 705, § 1), to the present seven-week provision. Moreover, unlike the exclusion in *Geduldig,* the § 592.1 suspension is financially unsound since it forces the involuntarily idled worker onto the welfare rolls.* Finally in *Geduldig,* the discrimination was found to be rationally supportable because providing parallel aggregate coverage for each class, *Id.*, at 496, and because minimizing the burden upon participating employees, particularly those in low-income brackets and hence most in need of the insurance coverage. Section 592.1 by contrast irrationally penalizes those with a minimal causal relationship to a labor dispute and does so in derogation of New York's own stated policy.

Respondent attempts to distinguish the decision in *Hodory, supra,* on the ground that the Ohio statute excludes employees for the entire duration of a dispute whereas § 592.1 suspends benefits for only seven weeks. The seven-week limitation is irrational if one accepts the premise that § 592.1 is intended to preserve a neutral stance in labor disputes, since the subsequent granting of benefits (to strikers and non-participants alike) would tend to finance a strike and violate the neutrality ideal. Moreover, the limitation is meaningless since the vast majority of strikes endure less than seven weeks. *See, "Note", 39 N.Y.U.L. Rev., supra,* at

*New York's stated policy is to finance insurance for the involuntarily unemployed by taxation levied upon employers, which directly reflects the "experience rating" of each employer. See New York Labor Law, Art. 18 and particularly § 581 thereof; *Striley* v. *Fairbanks Co., et al.,* 15 App. Div.2d 385, 225 N.Y.S.2d 177 (3rd Dept. 1952). By denying unemployment benefits to non-strikers, the burden of mitigating their financial hardships falls upon public funds instead.

876, *citing* N.Y. Dep't of Labor, *Statistics on Work Stoppage in New York State*, 1963, p. 1.*

For the reasons set forth in *Hodory, supra*, and in our petition, § 592.1 cannot withstand scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it irrationally penalizes one class of persons who lose their jobs through no fault or action on their own part, *i.e.*, those who are laid off because of a labor dispute in which they are not involved, as contrasted to the treatment of all other involuntarily unemployed individuals. Moreover, the inconsistency between the decision of the three judge federal Court in *Hodory* and the decision of the New York Court of Appeals in the instant case is so patent that review should be granted by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 9, 1976

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*"[O]nly about sixteen percent of the strikes in 1963 lasted more than a month." *Id.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS

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LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit the within supplemental brief, pursuant to Rule 24(5) of the Rules of this Court, to advise the Court of an intervening matter not available at the time of the filing of Petitioners' reply brief.

Petitioners are advised that on October 4, 1976 this Court noted probable jurisdiction in *Ohio Bureau of Employment Services* v. *Hodory* (75-1707). *See,* 45 U.S.L.W. 3249.* The issues raised in *Hodory* are virtually identical to those raised in the instant matter. *Hodory,* like the within action,

* On October 5, 1976 the New York Times reported that *certiorari* had been granted in *Hodory;* however, in view of the procedural posture of the case, Petitioners believe this account to be inaccurate.

concerns the constitutionality of a labor dispute disqualification for unemployment insurance benefits when such disqualification is applied to idled workers who neither participate, aid nor abet a strike and who in no manner benefit from such strike. In this connection, Petitioners respectfully refer the Court to their Petition for a Writ of Certiorari, pp. 7-9, 13-17, and the Reply Brief for Petitioners, pp. 7-10.

In view of the foregoing, Petitioners respectfully urge that the Petition for a Writ of Certiorari in the within matter be granted in order that the constitutionality of the New York statute, questioned at bar, and that of the Ohio statute, in issue in *Hodory,* may be resolved in a consistent manner.

Respectfully submitted,

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